

No. 13017.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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COMET THEATRE ENTERPRISES, INC.,

*Appellant.*

*vs.*

LEON CARTWRIGHT, WILLIAM E. WILSON, Cartwright  
& Wilson Construction Co., a Copartnership, and Cart-  
wright & Wilson Construction Co., a Corporation,

*Appellees.*

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## APPELLANT'S OPENING BRIEF.

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MAURICE J. HINDIN,

111 West Seventh Street,

Los Angeles 14, California,

*Attorney for Appellant.*

FILED

SEP 26 1951

PAUL P. O'BRIEN, CLERK



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## APPELLANT'S OPENING BRIEF.

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### Statement of Pleadings and Jurisdictional Basis.

This appeal is taken from the judgment in favor of the defendant rendered after trial before the District Court of the United States for the Southern District of California, Central Division. The complaint sounds in a common count for money had and received and the answer is in the nature of a general denial [Tr. pp. 3, 4, 5]. Recovery was sought of money paid to the defendants under a void agreement.

Jurisdiction of the District Court is based upon diversity of citizenship. The plaintiff is a California corporation and maintains its principal place of business within Los Angeles County, California. The defendants and each of them are citizens of Utah [Tr. pp. 3, 6] and the amount of money involved in the controversy exceeds \$3,000.00 [Tr. pp. 4, 6 and 7].

### Concise Statement of Facts of the Case.

No dispute exists with reference to the facts in this case. Defendants are a co-partnership engaged in the general contracting business in Salt Lake City, Utah. The defendants were employed by plaintiff, a California corporation, in connection with the construction of a drive-in theatre by the plaintiff in Pasadena, California. The defendants performed general contracting services in connection with this employment which consisted of supervision of work by subcontractors, consultation with architects, arranging for and supervising two or more subcontractors to do various jobs in connection with the construction of the theatre. The defendants also furnished plans and specifications and held consultations with plaintiff's architect [Tr. pp. 6, 7].

The defendants at no time held any license to engage in building contracting work within the State of California or to perform the services they did. All of the services rendered by defendants were rendered in Pasadena, California [Tr. pp. 6, 7].

The plaintiff paid the defendants \$3,500.00 on account of these services. The plaintiff by this action sought to recover the said \$3,500.00 upon the theory that under the law of California the agreement between the plaintiff and defendants was illegal and wholly void in that defendants did not have or hold the required building contractor's license and that under the law of California the defendants could not legally retain this money though it was voluntarily paid. Judgment went for the defen-

dants. The plaintiff's motion for a new trial was denied and plaintiff now prosecutes this appeal.

The Trial Court found that the agreement between the plaintiff and the defendants was illegal but denied plaintiff's recovery on the theory that since the payment was made voluntarily the court would leave the parties to this illegal contract where it found them and give no relief to the plaintiff.

### **Question of Law Presented on This Appeal.**

The sole question presented on this appeal is whether or not as a matter of law a party who has voluntarily made payment to an unlicensed defendant for contracting services performed by the defendant, which by State law required the defendant to hold a valid contractor's license, may recover the money once it has been paid.



## ARGUMENT.

### A Contract for Building Contracting Services Which Requires a License by the Party Performing Such Services Is Absolutely Void if Performed by an Unlicensed Party.

This appeal involves the interpretation and application of Sections 7026, 7028, 7030, 7031, 7055 and 7057 of the Business and Professions Code of the State of California. These Sections are set forth for convenience of the court as follows:

Sec. 7026. *“Contractor”*: *Defined*. The term contractor for the purposes of this chapter is synonymous with the term “builder” and, within the meaning of this chapter, a contractor is any person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, approve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor. (Amended by Stats. 1949, ch. 90, Sec. 1.)

Sec. 7028. *Engaging in business without license*. It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless such person is particularly exempted from the provisions of this chapter. (Added by Stats 1939, ch. 37, Sec. 1, p. 384.)

Sec. 7030. *Acting without license or conspiring to violate chapter: Misdemeanor*. Any person who acts in the



capacity of a contractor without a license, and any person who conspires with another person to violate any of the provisions of this chapter, is guilty of a misdemeanor. (Added by Stats. 1939, ch. 37, Sec. 1, p. 384.)

Sec. 7031. *Allegation and proof of license in action on contract.* No person engaged in the business, or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract. (Added by Stats. 1939, ch. 37, Sec. 1, p. 384.)

Sec. 7055. *Branches of contracting business.* For the purpose of classification, the contracting business includes any or all of the following branches:

(a) General engineering contracting.

(b) General building contracting.

(c) Specialty contracting. (Added by Stats. 1945, ch. 1159, Sec. 1.)

Sec. 7057. *General building contractor.* A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

This does not include any one who merely furnishes materials or supplies under Section 7045 without fabricating them into or consuming them in the performance of the work of the general building contractor. (Added by Stats. 1945, ch. 1159, Sec. 3.)

In construing and applying the foregoing Code sections, the Supreme Court of California has established that a contract for the performance of services by an unlicensed contractor, who is required to be licensed under the provisions of State law above referred to, is wholly void (as distinguished from being voidable).

The latest expression of the Supreme Court on this subject is found in the case of *Loving & Evans v. Blick*, 33 Cal. 2d 603. The Supreme Court of California in that case, commencing at page 607, uses the following pertinent language:

“There can be no question but that this case presents a clear violation of the statutes regulating the contracting business. Thus, while respondent Loving at all times possessed an individual contractor’s license, his respondent partner Evans did not, and the partnership, as such, failed to procure such a license. As appellant maintains, it has been repeatedly declared in this state that ‘a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract.’ (*Gatti v.*

*Highland Park Builders, Inc.*, 27 Cal. 2d 687, 689, 166 P. 2d 265; see also, *Haas v. Greenwald*, 196 Cal. 236, 247, 237 P. 2d 38, 59 A. L. R. 1493; *Wise v. Radis*, 74 Cal. App. 765, 774-776, 242 P. 90; *Holm v. Bramwell*, 20 Cal. App. 2d 332, 335-337, 67 P. 2d 114; *Phillips v. McIntosh*, 51 Cal. App. 2d 340, 343, 124 P. 2d 835); and that 'whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.' (*Firpo v. Murphy*, 72 Cal. App. 249, 253, 236 P. 968; see also, *Chateau v. Singla*, 114 Cal. 91, 94, 45 P. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750; *Moore v. Moore*, 130 Cal. 110, 113, 62 P. 294, 80 Am. St. Rep. 78; *Levinson v. Boas*, 150 Cal. 185, 193, 88 P. 825, 11 Ann. Cas. 661, 12 L. R. A. N. S. 575.)"

This rule was also enunciated in *Franklin v. Goldstone*, 33 Cal. 2d 628.

The services for which the defendants in the case now on appeal received \$3,500.00 from plaintiff were such services as required them to hold a valid contractor's license under Section 7057 of the Business and Professions Code. This they did not hold or possess. It is clear under California law that the defendants could not have successfully maintained an action for the collection of their fees had they sought to enlist the court's aid in collecting the same. The question is therefore raised as to whether or not this is the type of an action where the court will permit a party who has voluntarily paid money under such a void contract to recover the same. This matter will be discussed under the next point of argument.

II.

The Plaintiff Is Not in *Pari Delicto* With the Defendants Who Are Unlicensed Contractors and Under the Established Law of California Is Entitled to Recover the Money Paid by Them Under a Contract Which Is Wholly Void.

While under the general law a person cannot recover money paid by them to another under an illegal contract where both parties are equally guilty (because the court will leave persons who are in *pari delicto* where it finds, as for example, both parties to a gambling transaction) an exception is now well established in the situation where the statute which creates the illegality was made for the benefit and protection of a particular group or class of persons. Persons in the group for whose benefit or protection a statute is enacted are not in *pari delicto* with the wrongdoer. Such persons are the protected object of the very statute involved.

The District Court of Appeal of California in the case of *Elmers v. Shapiro*, 91 Cal. App. 2d 741, making this distinction clear, at page 754, used the following pertinent language:

“It is, of course, a general rule that neither party to an illegal transaction may secure the restoration of property or money transferred in the course of the illegal transaction. Such parties are said to be *in pari delicto* and neither may recover from the other. There has always been a judicial aversion to aiding a malefactor in profiting from his own wrong so that in such cases the court will leave such parties where it finds them. But such rules have no application to transactions illegal because in violation of a statute, where such statute is aimed at protecting one of the parties to the transaction. In such cases there is no

parity of *delictum*, and the one protected by the law may, at any time, resort to the law to recover money paid even though the illegal transaction is completed.”

This same rule has been enunciated and followed in the case of *Miller v. Calif. Roof Co.*, 55 Cal. App. 2d 136.

This general rule is not peculiar to California but is a well recognized general rule of law widely followed throughout the United States.

This principle is recognized by the editors of American Jurisprudence. In 12 *Am. Jur. (Contracts, Secs. 217 and 218)*, page 735, the following statement is found:

“Where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other or where the one party is the principal offender and the other criminal only from a constrained acquiescence in the illegal conduct, in such cases there is no parity of *delictum* at all between the parties, and the one protected by the law or acting under compulsion may, at any time, resort to the law to recover money paid, *though the illegal transaction is completed*.

. . . . .

Hence, where the parties are not in *pari delicto*, actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves, being against law, cannot be sued on.”

It should be noted that under the California contractors law no penalty is imposed upon one dealing with an unlicensed contractor.

The contract between the plaintiff and defendants for the performance of contracting services by defendants was



wholly void because the defendants did not hold the required license to perform the services contracted for. Likewise the contractor's licensing statutes were enacted for the protection of the public in dealing with persons holding themselves out as being qualified to render services requiring particular skills. The plaintiff was one of the group which was sought to be protected by the Contractor's Licensing Statutes, and is therefore under the law not in *pari delicto* with the defendants.

Were this exception not so well recognized in the law, the position of the trial court in denying the plaintiff the relief it sought might be justified. The plaintiff was one of the very class of persons sought to be protected by the contractor's license law.

The California Contractor's License Law as embodied in the Business and Professions Code, which are hereinabove set forth are statutes made for the protection of the public. The statutes were enacted to protect the public including this plaintiff from being imposed upon by persons who did not demonstrate to the licensing authorities their ability and qualifications to perform the service which they offered to perform. The Supreme Court of California so expressly held in *Loving & Evans v. Blick*, 33 Cal. 2d 603, and also in *Franklin v. Goldstone*, 33 Cal. 2d 628.

The final question therefore presented by this appeal is whether or not under the California law the plaintiff who is one of a protected class and who is not in *pari delicto* with the defendants is prevented from recovery of money paid under a void contract because the payment was volun-

tarily made. We respectfully urge that the Supreme Court of California has decided this question in the negative.

The Supreme Court of California in the case of *Miller v. McKinnon*, 20 Cal. 2d at page 89, in reversing the judgment for the defendant after the Trial Court had sustained a demurrer to the plaintiff's complaint for recovery of money paid under a void contract, used the following language:

"With the principles being as above stated, it inescapably follows that a right of action exists to recover moneys paid to a contractor for work and materials furnished the public agency where they were furnished in contravention of a statute requiring competitive bidding. *If, as we have seen, the contract is absolutely void as being in excess of the agency's power, the contractor acts at his peril, and he cannot recover payment for the work performed, it necessarily follows that any payments made to him for the work are illegally made and may be recovered.*" (Italics ours.)

The following pertinent language is also found in the same case at page 88 of the opinion:

"And even though the person with whom the contract was made has supplied labor and materials in the performance of the contract and the public agency has received the benefits thereof, he has no right of action to recover in *quantum meruit* the reasonable value thereof. (*Reams v. Cooley, supra; Zottman v. San Francisco, supra; Gamewell F. A. T. Co. v. Los Angeles, supra.*)"



The value, if any, of the defendants' services rendered to the plaintiff is not material to the case. The trial court made no finding as to the value of the services of the defendants.

Regardless of what actual benefit the plaintiff received from the illegal services rendered by the defendants, the law does not permit the defendants to offset the value of their illegal services. The law does not recognize any value in services rendered by one licensed to give such services, just as a lay person attempting to give legal advice may not be heard to say that the advice given by him was good legal advice.

The fact that plaintiff made voluntary payment or even received some value as a result of defendants' services under the void contract does not afford ground for denying the relief plaintiff seeks. The District Court of Appeal in *Miller v. City of Martinez*, 28 Cal. App. 2d 364, commencing at page 370, used the following language:

"It is contended that the purchase price of the goods cannot be recovered without an offer to return them. The contention is devoid of merit. It is directly answered in the following language taken from the case of *County of Shasta v. Moody*, 90 Cal. App. 519, 523, 524, 265 Pac. 1032: 'Appellant strenuously contends that the county is estopped from maintaining this action without first restoring, or offering to restore, to him the benefits received from the job work, printing, advertising, etc. There is no merit in this contention. *The contracts being void under the express provisions of the statute, and also being*

against public policy, there is no ground for any equitable considerations, presumptions or estoppels. (*Berka v. Woodward*, 125 Cal. 119, 128, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 229 Pac. 1020; *Nielson v. Richard*, 75 Cal. App. 680, 243 Pac. 697; 21 Cal. Jur. 888.) . . .

“The contracts in the case at bar, as we have seen, are against the express prohibition of the law and courts will not entertain any rights growing out of such a contract, or permit a recovery upon a quantum meruit or quantum valebat. (*Berka v. Woodward, supra.*)” (Italics ours.)

In *Brooks v. Brooks*, 48 Cal. App. 2d 347, at page 351, the Court used the following pertinent language:

“It is likewise settled that, where a party pays a consideration pursuant to the terms of a void agreement, he may immediately sue to recover the amount of such payments where, as in the instant case, the parties are not *in pari delicto* (*Smith v. Bach*, 53 Cal. App. 63, 64 (199 Pac. 1106); *McAllister v. Drapeau*, 14 Cal. 2d 102, 112, 92 Pac. 2d 911, 125 A. L. R. 800; *Restatement of the Law of Contracts* (1932), Vol. II, p. 1120, sec. 604.)”

Where the contract is void and the plaintiff is not in *pari delicto* with the defendant, recovery is proper under a complaint sounding in common count for money had and received.

*Baer v. Tippet*, 34 Cal. App. 2d 33;

*Randall v. Cal. L. B. Syn.*, 217 Cal. 597.

### Conclusion.

It is therefore respectfully submitted that the Trial Court erred in rendering judgment in favor of the defendants on the basis of the facts found by the court in this case. This is true because the contract for services rendered by unlicensed defendants to the plaintiff was wholly void under California law by reason of defendants' failure to possess the required license. Likewise the law is well established that the consideration paid under a wholly void contract is properly recoverable unless the plaintiff is in *pari delicto* with the defendants. This case falls squarely within the established rule of law that plaintiff is not in *pari delicto* with the defendants. Likewise the law is well established that where plaintiff is not in *pari delicto* with the defendants, a voluntary payment does not constitute a bar or estoppel.

It is respectfully submitted therefore that judgment should be reversed and the Trial Court directed to enter judgment in favor of the plaintiff.

Respectfully submitted,

MAURICE J. HINDIN,

*Attorney for Appellant.*